

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARLA HAZARD,

Plaintiff,

Case No. C10-5924-JLR-BAT

V.

MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration,

Defendant.

REPORT AND RECOMMENDATION

Carla Hazard seeks review of the denial of her Supplemental Security Income
application. She contends the ALJ did not properly consider the opinions of Daniel Neims,
. . . and the lay testimony of her mother and boyfriend. She also contends the case should be
denied to consider Dr. Neims' October 2008 report and her educational level. Dkt. 14. As
set forth below, the Court recommends the case be **REVERSED** and **REMANDED** for further
administrative proceedings.

PROCEDURAL HISTORY

Ms. Hazard is currently 48 years old, has a 10th grade education, and a certified nursing assistant certificate; she has worked as an office helper.¹ On May 16, 2009, she applied for

¹ Tr. 31-38, 58, 112

1 benefits, alleging disability as of December 20, 2006.² Her application was denied.³ After
2 conducting a hearing on August 21, 2008, the ALJ found Ms. Hazard not disabled.⁴ As the
3 Appeals Council denied Ms. Hazard's request for review, the ALJ's decision is the
4 Commissioner's final decision.⁵

5 THE ALJ'S DECISION

6 Utilizing the five-step disability evaluation process,⁶ the ALJ made the following
7 findings:

8 **Step one:** Ms. Hazard had not worked since May 10, 2007.

9 **Step two:** Ms. Hazard had the following severe impairments: disorders of the back
10 (discogenic and degenerative), degenerative disc disease of the lower back, and affective
disorders.

11 **Step three:** These impairments did not meet or equal the requirements of a listed
12 impairment.⁷

13 **Residual Functional Capacity:** Ms. Hazard can perform the full range of sedentary
14 work as follows: With normal breaks, she can stand and walk for two hours in an eight-
15 hour workday, and can sit for six hours in an eight-hour workday. She should avoid
concentrated exposure to vibrations. She can perform simple, repetitive tasks and some
complex tasks. She can interact with co-workers and supervisors and have superficial
public contact.

16 **Step four:** Ms. Hazard could not perform her past work.

17 **Step five:** There are jobs Ms. Hazard can perform and she is thus not disabled.

18 Tr. 12-15.

21 ² Tr. 112.

22 ³ Tr. 68.

23 ⁴ Tr. 7-17.

⁵ Tr. 1.

⁶ 20 C.F.R. §§ 404.1520, 416.920.

⁷ 20 C.F.R. Part 404, Subpart P, Appendix 1.

DISCUSSION

A. The ALJ's evaluation of Dr. Daniel Neims' opinions

3 The ALJ found Ms. Hazard's affective disorders were severe impairments. In assessing
4 the limitations these mental impairments caused, the ALJ relied on the opinions of state agency
5 reviewing physician Thomas Clifford, Ph.D., and Leslie Portovoit, Ph.D., another state
6 reviewing physician, who concurred with Dr. Clifford's opinions. Tr. 8. The ALJ gave great
7 weight to Dr. Clifford's opinion that Ms. Hazard could "do simple and some complex tasks that
8 required only limited contact with the general public." *Id.* The ALJ found examining physician
9 Daniel Neims, Psy.D., "came to similar conclusions as the claimant's functioning as to those of
10 the state medical consultants," noting Dr. Neims "reported the claimant had no cognitive or
11 social functioning limitations greater than moderate." Tr. 15.

12 Ms. Hazard argues the ALJ erred because (1) Dr. Neims' opinions are not similar to the
13 opinions of the state agency consultants; (2) the ALJ did not give sufficient reasons to reject Dr.
14 Neims' opinions; and (3) the ALJ's residual functional capacity assessment erroneously failed to
15 include all of Ms. Hazard's limitations.⁸ The Court agrees.

16 The record shows Dr. Neims' opinions are materially inconsistent with the opinions of
17 the state agency consultants. Dr. Neims opined Ms. Hazard had moderate limitations in her
18 ability to relate appropriately to co-workers and supervisors.⁹ In contrast, Dr. Clifford found Ms.
19 Hazard had no significant limitations in this regard.¹⁰ Dr. Neims found Ms. Hazard had
20 moderate limitations in her ability to exercise judgment and make decisions.¹¹ Dr. Clifford
21 found she was not significantly limited in her ability to make simple work-related decisions. Tr.

²² ⁸ Dkt. 14 at 4-6; Dkt. 16 at 2-3.

⁹ Tr. 224, 301, 318.

23 || 10 Tr. 287-88.

11 Tr. 224, 301, 318.

1 287. Dr. Neims found Ms. Hazard had moderate limitations in her ability to control physical or
2 motor movements and maintain appropriate behavior.¹² Dr. Clifford found Ms. Hazard had no
3 significant limitations in her ability to maintain socially appropriate behavior and to adhere to
4 basic standards of neatness and cleanliness. Tr. 288. Dr. Neims also found Ms. Hazard had
5 additional moderate limitations in areas not addressed by Dr. Clifford, such as her ability to learn
6 new tasks; perform routine tasks; and respond appropriately to and tolerate the pressures and
7 expectations of a normal work setting.¹³ In sum, substantial evidence does not support the ALJ's
8 finding that Dr. Neims and the state agency physicians reached similar conclusions.

9 Because the ALJ believed all of the medical sources shared the same opinions regarding
10 the extent of Ms. Hazard's mental limitations, the ALJ did not set forth any reasons to reject Dr.
11 Neims' opinions. This is problematic. The ALJ clearly accepted Dr. Clifford's opinion that Ms.
12 Hazard retained the ability to interact with coworkers and supervisors, and rejected Dr. Neim's
13 opinion that she had moderate limitations in this area. This is evidenced by the ALJ's finding
14 that Ms. Hazard had the residual functional capacity to "interact with co-workers and
15 supervisor." Tr. 13.

16 The ALJ, however, was not permitted to reject Dr. Neims' opinions and favor Dr.
17 Clifford's opinions without giving "specific and legitimate reasons" that are supported by
18 substantial evidence in the record. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996). An
19 ALJ does this by setting out a detailed and thorough summary of the facts and conflicting
20 evidence, stating his interpretation of the facts and evidence, and making findings. *Magallanes*
21 *v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ must do more than offer his conclusions;
22 the ALJ must also explain why the ALJ's interpretation, rather than the treating doctor's

23 ¹² Tr. 224, 301, 318.

¹³ Tr. 224, 301, 318.

1 interpretation, is correct. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007) (citing *Embrey v.*
2 *Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). Here, as the ALJ failed to provide any reasons to
3 reject Dr. Neims' opinions and favor the opinions of state consultants, the ALJ erred.

4 This error was not harmless. In determining a claimant's residual functional capacity, an
5 ALJ must assess all the relevant evidence, including medical reports and witnesses' descriptions
6 of limitation, to determine what capacity the claimant has for work. *See* 20 C.F.R. § 416.945(a).
7 As noted above, the ALJ did not include all of the limitations found by Dr. Neims in assessing
8 Ms. Hazard's residual functional capacity and failed to give reasons supported by substantial
9 evidence for doing so.

10 This error carried over to the hypothetical question the ALJ posed to the vocational
11 expert. Hypothetical questions that an ALJ poses to a VE to determine what work a claimant can
12 perform "must include 'all of the claimant's functional limitations, both physical and mental'
13 supported by the record." *Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002) (quoting *Flores*
14 *v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995)). Here, the vocational expert testified Ms.
15 Hazard could perform certain work based on a hypothetical question that asked the expert to
16 assume Ms. Hazard had "psychologically based limitations" that involved "no difficulties on
17 maintaining social functioning and no difficulties in maintaining concentration, persistence or
18 pace." Tr. 59. The expert was also asked to assume Ms. Hazard "was able to interact with
19 coworkers and supervisors." *Id.* But, when the vocational expert was asked to assume Ms.
20 Hazard had "moderate limitations" (which according to counsel was the inability to perform
21 certain tasks 10-20% of the time) to learn new tasks, perform routine tasks, interact appropriately
22 with coworkers and supervisors, and tolerate the normal expectations of a work place, the expert
23 opined Ms. Hazard would not be able to "maintain employment." Tr. 63-64.

1 Ms. Hazard argues, if credited as true, Dr. Neims' opinions establish disability and
2 directs a remand of this matter for an award of benefits. The Court may remand a case for an
3 award of benefits where "the record has been fully developed and further administrative
4 proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th
5 Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). This occurs when: (1)
6 the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2)
7 there are no outstanding issues that must be resolved before a determination of disability can be
8 made; and (3) it is clear from the record that the ALJ would be required to find the claimant
9 disabled if he considered the claimant's evidence. *Id.* at 1076-77.

10 Here, Ms. Hazard argues since Dr. Neims' opined she had a number of "moderate
11 limitations," she is disabled. Ms. Hazard equates "moderate limitations" with not being able to
12 perform work functions 10-20% of the time. However, a claimant is not automatically disabled
13 just because he or she has moderate limitations. *See Thomas v. Barnhart*, 278 F.3d 947, 955 (9th
14 Cir. 2002) (affirming the ALJ's finding that a claimant who had "moderate mental residual
15 functional capacity limitations" and a "marked limitation in her ability to maintain concentration
16 over extended periods" could perform the unskilled jobs identified by a vocational expert). Here,
17 the record needs clarification and development to determine whether Dr. Neims' holds the
18 opinion that Ms. Hazard cannot perform work functions 10-20% of the time, as Ms. Hazard
19 suggested in the hypothetical to the vocational expert, or whether the doctor holds some other
20 opinion. On remand the ALJ should reassess all of Dr. Neims' opinions, including those
21 contained in his report dated October 2, 2008. Tr. 354.

22 **B. Consideration of Ms. Hazard's level of education**

23 At step five, the ALJ must determine whether a claimant is able to do any other work

1 considering among other things, the claimant's level of education. Tr. 15-16, *see also* 20 CFR
2 416.912(g) and 416.960(c). At the hearing the ALJ conducted, Ms. Hazard testified she was a
3 special education student. Tr. 33. The ALJ indicated she would be "happy to go" with special
4 education if there was documentary evidence to support it. Tr. 60-61. However, the ALJ found
5 the documentary evidence showed Ms. Hazard had a regular education and thus asked the ALJ a
6 hypothetical question that assumed this level of education. Ms. Hazard contends the case should
7 be remanded because there is evidence she was a special education student, and the vocational
8 expert indicated her opinion about Ms. Hazard's ability to perform work might be different if
9 Ms. Hazard were a special education student. *Id.*

10 The Commissioner argues the ALJ properly rejected Ms. Hazard's claim she was a
11 special education student because Ms. Hazard gave inconsistent statements about her
12 education—she stated in her application for benefits she had a regular education but later
13 testified she had a special education. Dkt. 15 at 10. However, the ALJ did not rely of this
14 reasoning to reject Ms. Hazard's testimony and thus neither will the Court. *See Pinto v.*
15 *Massanari*, 249 F.3d 840, 847-48 (9th Cir. 2001). Instead, as noted above, the ALJ stated she
16 would be happy to "go with" special education if there was documentary evidence in support.

17 Four days after the hearing, counsel submitted a letter to the ALJ indicating that upon
18 further review, there was thus documentary evidence supporting Ms. Hazard's claim of being a
19 special education student; specifically, Ms. Hazard's report card noted she had participated in the
20 "learning center," a program which includes special education students. Tr. 107. The ALJ erred
21 by failing to give any reason to reject Ms. Hazard's assertion that the report card supported her
22 claim of being a special education student. This error is not harmless in light of the vocational
23 expert's indication that she might have a different opinion if Ms. Hazard were a special

1 education student. On remand the ALJ should assess whether Ms. Hazard is a special education
2 student and its impact, if any, on her ability to work utilizing the services of a vocational expert
3 if deemed necessary.

4 **C. Credibility of lay witnesses**

5 Ms. Hazard's mother and boyfriend completed "function reports" regarding Ms. Hazard's
6 symptoms.¹⁴ The parties agree the ALJ erred by failing to address the testimony of these lay
7 witnesses.¹⁵ The Commissioner, however, contends this failure was harmless "because the ALJ
8 appropriately accommodated all of Plaintiff's limitations stemming from her medically
9 determinable impairments." *Id.* This argument fails. As discussed above, the ALJ erred in
10 evaluating Dr. Neims' opinions and Ms. Hazard's educational level in assessing her residual
11 functional capacity. Lay testimony as to a claimant's symptoms is competent evidence that the
12 ALJ must take into account, unless the ALJ expressly determines to disregard such testimony
13 and gives reasons germane to each witness for doing so. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th
14 Cir. 2001). Accordingly, the ALJ should consider the lay testimony on remand.

15 **CONCLUSION**

16 For the foregoing reasons, the Court recommends the Commissioner's decision be
17 **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand,
18 the ALJ should: reassess Dr. Neims' opinions, including those contained in his report dated
19 October 2, 2008; consider the lay testimony, and assess whether Ms. Hazard is a special
20 education student and its impact, if any, on her ability to work utilizing the services of a
21 vocational expert if deemed necessary.

22 Any objections to this Recommendation must be filed and served upon all parties no later

23 ¹⁴ Tr. 130, 182.

¹⁵ Dkt. 6 at 12.

1 than **August 23, 2011**. If no objections are filed, the matter will be ready for the Court's
2 consideration on that date. If objections are filed, any response is due within 14 days after being
3 served with the objections. A party filing an objection must note the matter for the Court's
4 consideration 14 days from the date the objection is filed and served. The matter will then be
5 ready for the Court's consideration on the date the response is due. Objections and responses
6 shall not exceed twelve pages. The failure to timely object may affect your right to appeal.

7 DATED this 9th day of August, 2011.

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10 BRIAN A. TSUCHIDA
11 United States Magistrate Judge
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